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No. 03-1514

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ENRIQUE VARGAS-DURAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent provides no sufficient reason for denying the petition rather than holding it pending the decision in *Leocal* v. *Ashcroft*, cert. granted, No. 03-583 (Feb. 23, 2004), and then disposing of it accordingly.*

1. Respondent identifies three differences between the definition of "crime of violence" in 18 U.S.C. 16 and

* As the brief in opposition notes (at 1), the district court resentenced respondent to 30 months of imprisonment on February 3, 2004, in accordance with the mandate of the court of appeals. See Br. in Opp. App. 1-2. We have been informed by the Department of Homeland Security, Immigration and Customs Enforcement, that he was removed to Mexico two weeks later. Respondent's removal does not render the case moot, because, if the original 64-month sentence is reinstated, he could be required to serve the remainder of the sentence in the event that he reentered the United States. See, *e.g.*, *United States* v. *Orrega*, 363 F.3d 1093, 1095-1096 (11th Cir. 2004) (citing cases from other circuits). Cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

the definition of that term in Sentencing Guidelines § 2L1.2. Br. in Opp. 4-5. He contends that, because of these differences, the Court's interpretation of 18 U.S.C. 16 in *Leocal* "will clearly be of extremely limited, or no, value" in interpreting Sentencing Guidelines § 2L1.2. Br. in Opp. 5. Respondent is mistaken.

The first two differences between the statute and the Guideline are that the former, but not the latter, encompasses force against the "property" as well as the person of another, and that the latter, but not the former, includes a list of offenses that are always crimes of violence. Br. in Opp. 4-5. Because the crime at issue in this case and *Leocal*—causing serious bodily injury while driving under the influence of alcohol—is not one of those enumerated in the Guideline's definition of "crime of violence," and because it does not involve damage to property, these differences are immaterial.

The third difference between the statute and the Guideline is that the former, but not the latter, includes an alternative definition of "crime of violence." The statutory definition encompasses not only an offense that "has as an element the use * * * of physical force against the person * * * of another" (18 U.S.C. 16(a)), but also a felony offense that, "by its nature," involves a "substantial risk" that physical force "may be used" in committing the offense (18 U.S.C. 16(b)). This difference is not a reason to deny certiorari either, because it cannot be known in advance whether the Court will decide *Leocal* on the sole basis of the alternative definition (Section 16(b)) without addressing whether the crime at issue satisfies the definition that is nearly identical to the Guideline's definition (Section 16(a)). And even if the Court were to decide the case on the basis of Section 16(b) alone, its decision could still be relevant to whether the court of appeals correctly

interpreted the Guideline, because the Court might hold that the "use" of force under Section 16(b) need not be intentional, and that interpretation of "use" would be relevant to the meaning of the same term in Section 16(a).

As additional support for the argument that the decision in *Leocal* will provide little assistance in interpreting Sentencing Guidelines § 2L1.2, respondent contends that there is "absolutely no indication" that, in defining "crime of violence" as it did in Section 2L1.2, "the Sentencing Commission intended in any way to incorporate or reference the concerns leading to the enactment of 18 U.S.C. § 16." Br. in Opp. 5. But the best evidence of the Commission's intent is the language it used in the definition, and the meaning of identical language in the statutory definition of the same term is therefore highly relevant to the question of the Commission's intent in defining "crime of violence" in Section 2L1.2. Respondent asserts that "the available history reflects that the Sentencing Commission's design in drafting this provision was to ***distinguish*** it from 18 U.S.C. § 16" (Br. in Opp. 5), but the history he cites—Guidelines Amendment 632—says nothing at all about the meaning of "crime of violence" in Section 2L1.2, much less that the Guideline's definition differs from that in 18 U.S.C. 16.

Respondent finds it "ironic" that, in a case in which there is only an "attenuated" connection between the Guideline and the statute, the government is arguing for an exception to the general rule against certiorari review of decisions interpreting a Guideline, because the government invoked the general rule in opposing certiorari in *Leal-Rivera* v. *United States*, cert. denied, No. 03-5434 (Nov. 17, 2003), a case in which "the Guidelines term directly incorporated by reference [a] sta-

tutory term." Br. in Opp. 6 n.1. Unlike *Leal-Rivera*, however, this case is not one in which the Court is being asked to grant certiorari to engage in a "substantive interpretation" of a Guideline. *Id.* at 2, 3, 8. It is being asked only to hold the petition and then, depending on the outcome of a case in which certiorari has already been granted, either deny certiorari or grant certiorari for the limited purpose of vacating the judgment of the court of appeals and remanding for further consideration in light of the decision in that case.

2. Respondent next contends that, contrary to what the government says in the petition (Pet. 9), the Fifth Circuit's interpretation of Sentencing Guidelines § 2L1.2 "was not dependent upon that court's precedents interpreting [18 U.S.C.] § 16." Br. in Opp. 7. Respondent is again mistaken. In holding that an offense has as an element the "use" of force if the statute requires that the defendant intentionally availed himself of the force, the court of appeals relied on three things: text (dictionary definitions of "use"), Pet. App. 8a-10a; context (the juxtaposition in the Guideline of "use," "attempted use," and "threatened use"), *id.* at 10a; and precedent (Fifth Circuit cases interpreting "use" in 18 U.S.C. 16), Pet. App. 10a-13a. Thus, while Fifth Circuit case law on Section 16 was not the sole basis for the court's interpretation of Section 2L1.2, it certainly was one of the bases.

3. Respondent's final contention is that holding the petition until *Leocal* is decided will leave the law in the Fifth Circuit "unsettled" and "h[o]ld up" illegal-reentry cases there. Br. in Opp. 9. It is difficult to see how holding the petition will have that effect, since the pendency of a certiorari petition does not prevent district courts from imposing sentence, or Fifth Circuit panels from deciding appeals, in accordance with the decision

below in cases that are governed by it. It is true that there is some uncertainty about whether that decision will remain the law, and it is possible (if unlikely) that some courts in the Fifth Circuit might decide to hold a case in abeyance until the uncertainty is resolved. But the uncertainty is attributable to the pendency of *Leocal*, which could effectively overrule the decision below regardless of whether the petition is held.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Leocal* v. *Ashcroft*, No. 03-583, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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